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Supreme Court, U.S.
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No. 97-674

In The

Supreme Court of the United States

October Term, 1997

JOAN CAROL LIPIN,

Petitioner,

vs.

AMERICAN NATIONAL RED CROSS, AMERICAN RED CROSS IN GREATER NEW YORK, ROBERT M. BENDER, JR., MARY STANTON, MARK A. JACOBY, LAWRENCE J. BAER, JESSE D. WOLFF, JAMES T. BYRNE, JR., CARL DESCH and BARBARA E. FLETCHER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED

Did the Second Circuit Court of Appeals correctly conclude, based upon New York State claim preclusion law, that the dismissal, with prejudice, of petitioner's prior state court action based upon petitioner's "heinous" and "egregious" litigation misconduct, precludes the prosecution of her identical and "transactionally related" claims in federal court?

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

The American National Red Cross is a federally chartered corporation created by an act of Congress, 36 U.S.C. § 2. The American National Red Cross has no parent company. The American Red Cross in Greater New York is a unit chartered by the American National Red Cross. Neither the American National Red Cross nor the American Red Cross in Greater New York has any subsidiaries that are not wholly owned.

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OPINIONS BELOW

The United States Court of Appeals for the Second Circuit's Corrected Summary Order, dated May 22, 1997, 113 F.3d 1229 (2d Cir. 1997) (unpublished table decision) (1a-18a)[1] is the decision that is subject to review by this Court. Petitioner erroneously asserts that the Second Circuit's Summary Order, dated December 12, 1996, 104 F.3d 355 (2d Cir. 1996) (unpublished table decision) (20a-27a) also is subject to review by this Court. However, the Second Circuit's December 12, 1996 Summary Order was expressly vacated in its subsequent May 22, 1997 Summary Order. Thus, the Second Circuit's December 12, 1996 Summary Order is not subject to review by this Court.

STATEMENT OF THE CASE

A. The Dismissal of Petitioner's Prior State Court Action

On January 9, 1992, petitioner's prior New York State court action, *Lipin v. Robert M. Bender, Jr., The American National Red Cross and American Red Cross in Greater New York*, N.Y. Sup. Ct. Index No. 15653/89 ("*Lipin I*"), was dismissed pursuant to New York Civil Practice Law and Rules ("CPLR") § 3103(c) to remedy petitioner's "heinous" and "egregious" litigation misconduct. In a ruling that was affirmed by the New York Court of Appeals,[2] the state trial court found, largely based upon petitioner's own undisputed testimony, that petitioner had surreptitiously removed privileged documents belonging to

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1. Citations followed by the suffix "a" refer to the Appendix annexed to the Petition for a Writ of Certiorari, dated October 16, 1997.

2. *Lipin v. Bender*, 84 N.Y. 2d 562, 644 N.E. 2d 1300, 620 N.Y.S. 2d 744 (1994) (322a-333a). Petitioner did not seek a Writ of Certiorari from this Court to review the New York Court of Appeals' determination affirming dismissal of her state court action.

defendants' counsel from the counsel table in a state courthouse hearing room while defendants' counsel was otherwise occupied in a hotly contested oral argument to resolve certain discovery disputes. The privileged documents included summaries of defendants' counsel's interviews of the individual defendant and the corporate defendants' employees. The court found that petitioner secreted the privileged documents away in a file folder, removed them from the hearing room, photocopied them and then attempted to use them to extort a "shotgun" settlement (including threats to "go to the press"). (323a-325a). The state court determined that even after being ordered to relinquish possession of the documents and all copies thereof to her counsel, who was to secure them in a locked vault, petitioner retained possession of the documents, studied them and took and retained copious notes from them. Thereafter, petitioner placed the privileged documents in a cabinet to which she had unrestricted access as a paralegal employed in her own counsel's office. (325a).

The state trial court dismissed petitioner's state court suit, concluding:

> [T]he actions of the plaintiff and her attorney were so egregious in taking this material that was clearly the attorney's work product, clearly interviews with the defendant's employees, clearly not for perusal by any other attorney or litigant in this litigation, so heinous that the only remedy, as much as I dislike to do this, is to dismiss the lawsuit. Otherwise, there is no meaning to privilege, there is no meaning to conduct among attorneys, and there is no rule of law.
>
> Whatever was in these papers was confidential. That confidentiality was broken. It was repeatedly

> broken by both the litigant and the attorney, and cannot be countenanced by the Court.
>
> Therefore, I am dismissing the lawsuit in its entirety. (311a).

The New York Court of Appeals determined that the trial court's order dismissing petitioner's action was within its discretion to enter "an appropriate order" pursuant to CPLR § 3103(c)[3] to remedy the taint injected into the state court action. The New York Court of Appeals observed that the extreme measure of dismissal — "likely the severest remedy that may be visited upon a plaintiff" — was warranted under the circumstances of the case. (331a, 332a). The court recognized that after studying, retaining, photocopying and handcopying the privileged documents, "[p]laintiff's knowledge of course can never be purged." (332a).

B. The Dismissal of Petitioner's Federal Court Actions

Following the state trial court's January 9, 1992 dismissal of her state court action, on June 17, 1992, petitioner commenced *Lipin v. American National Red Cross, American Red Cross in Greater New York, Robert M. Bender, Jr., Mary Stanton, Mark A. Jacoby, Lawrence J. Baer and Jesse D. Wolff*, 92 Civ. 4455 (LBS) ("*Lipin II*") in the United States District Court for Southern District of New York. In *Lipin II*, petitioner alleged the identical claims set forth in *Lipin I* and certain transactionally related claims against the individual and Red Cross defendants as well as the counsel who represented them in *Lipin I*. Petitioner included in her complaint in *Lipin II* references to the information contained in the privileged documents and, indeed, expressly incorporated their contents by reference in her

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3. CPLR § 3103(c) is reproduced at 369a.

complaint, despite a state court order prohibiting her from making use of the documents or information contained in them. Based on petitioner's violation of the state court's order, defendants in *Lipin II* obtained a stay from the District Court in order to seek relief in the state court.

Ultimately, after numerous unsuccessful attempts by petitioner to lift the stay in the District Court and the Second Circuit and several recusal motions in the state and federal courts, the District Court continued the stay in *Lipin II* until petitioner's appeals of the state court's dismissal were determined. In the interim, on March 5, 1993, the day after the District Court denied petitioner's last motion to vacate the stay in *Lipin II*, petitioner commenced yet another action in the District Court, *Lipin v. American Red Cross in Greater New York, American National Red Cross, Robert M. Bender, Jr., James T. Byrne, Jr., Carl Desch and Barbara Fletcher*, 93 Civ. 1334 (LBS), ("*Lipin III*"), again alleging various claims which were either identical or transactionally related to those previously dismissed in *Lipin I*. The District Court stayed *Lipin III* on the same basis as *Lipin II* had been stayed. (5a-6a, 35a-36a).

Following the New York Court of Appeals' affirmance of the dismissal order in *Lipin I*, respondents moved to dismiss *Lipin II* and *Lipin III* on the grounds that the disposition of *Lipin I* barred *Lipin II* and *Lipin III*. (6a). The District Court granted respondents' motion to dismiss *Lipin II* and *Lipin III* based upon grounds of claim preclusion. 1996 WL 18901 (S.D. N.Y. January 17, 1996) (28a-50a). The United States Court of Appeals for the Second Circuit initially affirmed the District Court's determination in a Summary Order issued on December 12, 1996, based upon grounds of both claim preclusion and issue preclusion. 104 F.3d 355 (2d Cir. 1996) (unpublished table decision) (20a-27a). Later, the Second Circuit vacated its December 12, 1996 Summary Order and issued a Corrected

Summary Order on May 22, 1997, affirming the District Court's determination on grounds of claim preclusion alone. 113 F.3d 1229 (2d Cir. 1997) (unpublished table decision) (1a-18a).

REASONS FOR DENYING THE WRIT

Petitioner makes no effort to address the considerations governing review on certiorari set forth in Rule 10 of the Rules of this Court. Moreover, the Petition fails to establish any compelling reason for granting a Writ of Certiorari — it identifies neither a conflict among appellate courts on an important issue nor an important but unsettled question of federal law.

The decision of the Second Circuit is not in conflict with the decision of another United States Court of Appeals or a state court of last resort. The Petition attempts to create a purported conflict between the Second Circuit's decision in this case and the Fourth Circuit's decision in *United States v. Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. 1993). (Pet. at 13). *Shaffer* directly involved the fact-based question of whether dismissal was an appropriate remedy, under the federal courts' inherent power, for the harm caused by attorney misconduct. In *Lipin I*, the New York Court of Appeals was faced with the question of whether dismissal was an appropriate remedy, under governing New York law, for the prejudice resulting from the egregious and heinous misconduct of petitioner. Petitioner chose not to request review by this Court of the New York Court of Appeals' determination in *Lipin I*, and the issue of the propriety of the state court's dismissal under governing state law was not before the Second Circuit in *Lipin II* and *Lipin III*. (8a-9a). There is, therefore, no "conflict" because the Second Circuit and the Fourth Circuit were deciding different issues.

Nor does the Petition identify any important question of federal law that has not been, but should be settled by this Court. The Second Circuit simply applied New York's claim preclusion law as did the District Court. As this Court ruled long ago, the preclusive effect of a state court judgment on a subsequent action brought in federal court is to be determined in accordance with state law. *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 81 (1984); *See also* 28 U.S.C. § 1738 (implementing full faith and credit clause, U.S. Const. Art. IV, § 1).[4]

The Second Circuit observed that the New York courts directly addressed the preclusive effect of the dismissal of *Lipin I* in the context of a dispute raised by petitioner as to whether the January 9, 1992 state court dismissal order had been with prejudice. In that context, the New York courts observed that "[t]o allow [petitioner] to commence a new action would be to circumvent the clear intent of the prior order." *Lipin v. Bender*, 216 A.D. 2d 131, 629 N.Y.S. 2d 3, 3 (N.Y. App. Div. 1995), *leave to appeal dismissed in part, denied in part*, 88 N.Y. 2d 866, 667 N.E. 2d 335, 644 N.Y.S. 2d 685 (1996) (16a).[5] Applying New York's transactional approach to claim preclusion,[6] the Second Circuit analyzed the claims alleged in

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4. 28 U.S.C. § 1738 is reproduced at 362a.

5. Petitioner mischaracterizes the state court's dismissal as a "penalty dismissal", despite the fact that the New York Court of Appeals characterized the dismissal as a necessary "remedy" in light of the extreme prejudice caused by petitioner's persistent and egregious misconduct. (331a-332a). Regardless of the label ("penalty" or "remedy"), the only relevant question is the one addressed and answered affirmatively by the Second Circuit — *i.e.*, whether the state court would give preclusive effect to the dismissal order. (11a-16a).

6. "[O]nce a claim is brought to a final conclusion, all other claims (Cont'd)

both *Lipin II* and *Lipin III* and compared them with those which were alleged or could have been alleged in *Lipin I*, concluding that they were *all* barred by the state court's dismissal in *Lipin I*.

The instant Petition does not actually seek review of the Second Circuit's decision. Rather, it seeks review of the underlying decisions of the New York State courts. The issues which petitioner attempts to raise for review by this Court — such as the scope of the attorney-client privilege and alleged misconduct by the defendants and their counsel — were all matters which were extensively litigated in numerous proceedings and appeals and conclusively settled by the New York State courts.[7] Petitioner, having failed to seek a Writ of Certiorari from this Court to review the New York Court of Appeals' affirmance of the state trial court's dismissal of her

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(Cont'd)
arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y. 2d 353, 357, 429 N.E. 2d 1158, 1159, 445 N.Y.S. 2d 687, 688 (1981). Claims which were actually alleged as well as those transactionally related claims which could have been alleged are precluded. *See Smith v. Russell Sage College*, 54 N.Y. 2d 185, 194, 429 N.E. 2d 746, 750, 445 N.Y.S. 2d 68, 72 (1981), *reargument denied*, 55 N.Y. 2d 878, 433 N.E. 2d 537, 448 N.Y.S. 2d 1026 (1982).

7. Petitioner's due process challenge to the decision below is in reality a belated attempt to obtain indirect review of the state court proceedings which resulted in the dismissal of her action. It is without any foundation in the law. It is well-established that a court's dismissal of a case at the pre-trial stage for an appropriate reason does not implicate any violation of constitutional rights. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (holding that dismissal due to discovery abuse was proper); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-354 (1909) (finding no due process violation where case was dismissed for failure to obey discovery order).

original state court action, has waived her opportunity to seek such review. The Second Circuit's decision — which was simply a straightforward application of New York's settled claim preclusion law — does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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